

HIGH COURT OF CHHATTISGARH, BILASPUR

WPC No. 2364 of 2019

- M/s Ramniwas Poddar, Through Its Partner Keshav Poddar, S/o Late Ramniwas Poddar, Aged - 59 Years, Lila - Kunj, Vivekanand Chowk Post - Manendragarh, District - Koriya Chhattisgarh. - 497442

---- Petitioner

Versus

1. State Of Chhattisgarh Through Engineer - In - Chief, Department Of Public Works, Nirman Bhawan, North Block, Atal Nagar, Naya Raipur District - Raipur Chhattisgarh
2. The Superintending Engineer, Department Of Public Works Ambikapur Circle , Ambikapur District Surguja Chhattisgarh
3. The Executive Engineer, Department Of Public Works, Division Koriya, Koriya Chhattisgarh

-----Respondents

For Petitioner : Shri Kshitiz Sharma, Advocate
For Respondents/State : Shri Gagan Tiwari, Dy GA

**Hon'ble Shri PR Ramachandra Menon, Chief Justice &
Hon'ble Shri Justice Parth Prateem Sahu
Order on Board**

Per PR Ramachandra Menon,CJ

14.08.2019

1. Heard learned counsel for the parties.
2. The termination of the contract, forfeiting the EMD (Earnest Money Deposit) by the Executive Engineer i.e. the 3rd respondent herein is put to challenge by the petitioner, who was awarded the work as per Annexure P/5 dated 06.06.2018.
3. The sequence of events is as follows:-

Annexure P/2 notification was issued by the 2nd respondent on 05.04.2018 with regard to the construction of a road from Sara to Amarpur, stipulating

the time for completion of work as six months from the reckoned date. The petitioner participated in the bid and turned to be successful by getting placement as L1, based on which Annexure P/5 work order was issued to him on 06.06.2018, alerting that the work had to be completed within four months including the rainy season. The petitioner submitted Annexure P/8 representation dated 24.07.2018 stating that there was an anomaly in so far as the tender notification stipulated the time for completion of the work as 'six months'; whereas, in the work order it was shown 'four months' including the rainy season. The petitioner sent Annexure P/9 representation dated 13.8.2018 as well, requesting the authorities to correct the anomaly and issue a revised work order.

4. The learned counsel for the petitioner submits that the work site was not handed over to the petitioner for quite long and the matter was brought to the notice of the authorities concerned, pursuant to which a joint inspection was held on 16.08.2018 as revealed from Annexure P/10. It was conceded by the authorities concerned that the site was not ready, as there were standing crops. It was in the said circumstance, that Annexure P/10 was submitted by the petitioner seeking for issuance of a corrected work order and to make the site available for carrying out the work.

5. The learned counsel submits that the request was repeated by submitting various other representations, which have been annexed along with Annexure P/11 dated 15.9.2018.

6. On 05.01.2019, Annexure P/12 notice was issued by the 3rd respondent referring to some breach on the part of the petitioner,

particularly with regard to Clause 3 of Annexure P/2 NIT, referring to the delay/abandoning the work. The petitioner submitted Annexure P/13 reply on 08.01.2019 referring to the non-issuance of the amended work order. This was followed by Annexure P/14 reminder dated 31.1.2019 as well. The 3rd respondent issued Annexure P/15 on 06.02.2019 seeking for explanation as to why the contract shall not be terminated; in response to which Annexure P/16 was submitted by the petitioner on 16.03.2019 referring to the non-issuance of corrected work order, simultaneously expressing his preparedness to carry out the works. It is stated that the petitioner, in the meanwhile, having obtained the site on 10.12.2018, as borne by Annexure P/13, had defected certain earth works therein. However, since the corrected work order was not issued, particularly with regard to the time for completion of the work, it is the case of petitioner that he did not proceed further and was awaiting the outcome in response to the various representations submitted in this regard. It is all of a sudden that Annexure P/1 order came to be issued on 27.06.2019, whereby the work was terminated and the EMD was forfeited; which made the petitioner to approach this Court with the prayers in the following terms:

“The petitioner prays for the following reliefs:

10.1 A writ and/or an order in the nature of writ of mandamus do issue calling for the records pertaining to the petitioners' case from the respondent authorities for its kind perusal.

10.2 A writ and/or order of an appropriate nature do issue quashing the impugned communication dated 27.06.2019 (Annexure P-1) in the interest of justice.

10.3 Issue appropriate writ/order of an appropriate nature directing the respondent authorities to either permit the petitioner

to execute the construction work within such stipulated time, as this Hon'ble Court may deem fit.

10.4 A writ and/or an order in the nature of appropriate writ do issue directing the respondent authorities to refund the Earnest Money amounting to Rs.1,14,300/- and also the security Deposit amounting to Rs.23,31,600/-”

7. The primary submission made by the learned counsel for the petitioner is that there is an anomaly insofar with regard to time for completion of the work between the NIT and the work order and it was never corrected by the respondents, despite many a representation. The further contention is that the Executive Engineer i.e. the 3rd respondent herein who issued the impugned order Annexure P/1 was having no power or authority to forfeit the EMD, though he was having power to have the contract terminated. The learned counsel further makes a submission that since there is a serious mistake with reference to the time for completion of the work shown in the work order and the tender notification the interpretation should be in favour of the petitioner, by virtue of the law declared by the Apex Court in 2009 (5) SCC 313 in **Bank of India and another Vs K Mohandas and others** and connected cases.

8. The learned counsel representing the Government submits that there is absolutely no merit or bonafides, in the contentions raised on the part of the petitioner. The petitioner was well aware of the fact that the actual time for completion of work was only 'four months' including rainy season as clearly shown in the Appendix at Form-A which also forms part of the tender documents. It was after this, that the proceedings were

finalized and the petitioner was awarded the work order as per Annexure P/5 and an agreement was also executed accordingly.

9. The learned State counsel further submits that the period of completion of the contract of the work, whether it should be 6 months or 4 months, was not the actual issue. It was on observing that there was absolutely no step from the part of the petitioner in giving effect to the work order, but for making some bush cutting and levelling of earth, after handing over the site on 10.12.2018, that the show-cause notice dated 06.02.2019 was issued. The learned counsel adds that the petitioner cannot dispute the specific clause incorporated in the Appendix. Insofar as the work involved herein was in Form-A, and it was clearly mentioned therein that the time for completion of the work was 'four months' including the rainy season. The petitioner though was very well aware of that fact, he did not take any earnest effort to have it commenced, pursued and completed accordingly.

10. The learned counsel representing the state further submits that the site was handed over to the petitioner admittedly on 10.12.2018 as mentioned in Annexure P/13 and it was only since the work was not completed, that the respondents were constrained to issue Annexure P/1 Order on 27.6.2019 i.e. after expiry of 06 months, terminating the contract, as there was no other alternative. But for levelling the ground, no other work was done by the petitioner, even as per their version. With regard to the course and events, the learned counsel for the State makes a specific reference to Annexure R/3 dated 22.01.2019, produced along with the reply, to the effect that there were several communications, referring to the

various discussions over mobile phones, the personal visits and as to the lapse on the part of the petitioner, which was made known to him at different points of time. The learned counsel also points out that, despite the receipt of the said letter, it was never sought to be replied and the contents of the letter stand un-rebutted. Though the learned counsel for the petitioner made an attempt, referring to Annexure P/14 dated 30.01.2019, stating that Annexure A/14 reply was sent after Annexure R/3, it is very much relevant to note that there is absolutely no reference in Annexure P/14 to Annexure R/3 dated 22.01.2019 issued by the 3rd respondent and the contents were never rebutted therein.

11. With regard to the challenge in respect of the authority of the Executive Engineer to forfeit the EMD, the learned counsel for the State makes a reference to Clause 3 (i) & (v). The said clauses are reproduced here for convenience or reference:

“Clause 3 (i)

The Executive Engineer may terminate the contract if the contractor causes a fundamental breach of the contract

Clause (v)

In addition to the provision contained in clause 2 above the Executive Engineer shall forfeit the earnest money and or security deposit and further recover/deduct/adjust a compensation @ 10% (ten percent) of the balance value of work left incomplete either from the bill, and or from available security performance guarantee or shall be recovered as “Arrears of land revenue”.

It is quite clear from the above clauses that the Executive Engineer is having the power to terminate the contract and on such an event, the EMD

is to be forfeited, as provided under Clause 3 (v). In the said circumstance, there is absolutely no merit in the contentions raised by the petitioner, challenging the authority of the Executive Engineer. If at all the petitioner is having any further grievance, it is quite open for him to resort to the appropriate remedy as provided in 'Clause 28' of the tender conditions/agreement.

12. After hearing both the sides, we do not find it as a fit case to call for interference. The disputed question of fact cannot be resolved by this Court in a proceeding under Article 226 of the Constitution of India. Without prejudice to rights and liberty of the petitioner to pursue alternative remedy in terms of Clause 28 of the NIT; the writ petition stands dismissed.

Sd/-
(PR Ramachandra Menon)
Chief Justice

Sd/-
(Parth Prateem Sahu)
Judge